

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL APPEALS NO. 1 AND 3 OF 2004.****CRIMINAL APPEAL NO. 1/2004.**

1. Shantaram N. Pawar,
r/o Near Municipality Pernem
c/o Anand Malpekar,
H. No. 240, Malpem,
Pernem, Goa.

2. Gurudas Hari Shetye,
r/o H. No. 372,
Gothanwada Ozri,
Pernem, Goa.

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Appellants.**VERSUS**

State of Goa,
as represented by Officer-In-Charge,
Pernem Police Station,
Pernem, Goa.

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Respondent.

Shri J.P. D'Souza, Advocate for the Appellants.

Shri S.N. Sardessai, Public Prosecutor for the Respondent.

CRIMINAL APPEAL NO. 3/2004.

1. Mr. Abhay Madhukar Dhargalkar,
resident of House No. 202/B,
Gaonwado, Dhargal, Pernem.

2. Mr. Avelino Anton Rodrigues,
resident of Chonwada,
Dhargal, Pernem, Goa.

3. Mr. Pradeep Madan Naik,
resident of House No.345,
Oxelbag, Dhargal, Pernem.

4. Mr. Subhash Govind Bicholkar,
resident of House No.11,
Manaswada/Khalchawada,

Pernem.

5. Mr. Mohandas Shankar Nasnodkar,
resident of House No.475,
Deulwada, Dhargal, Pernem.

6. Mr. Chandrakant Kashinath Chodankar,
resident of Arabo, Dhargal,
Pernem.

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Appellants.

VERSUS

S T A T E.

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Respondent.

Shri S.D. Lotlikar, Senior Advocate with Ms. S. Naik, Advocate for the Appellants.

Shri S.N. Sardessai, Public Prosecutor for the Respondent.

CORAM: N. A. BRITTO, J.

DATE OF RESERVING THE JUDGMENT: 03.09.2004.

DATE OF PRONOUNCING THE JUDGMENT: 09.09.2004.

J U D G M E N T:

The appellants herein are accused in Sessions Case No. 4/2000 who were charged and tried, inter alia, under Section 307 read with Section 149 I.P.C. and who have been convicted and sentenced under Sections 143, 147, 148, 323, 324, 384, 427, 392 r/w S.149 I.P.C. to different periods of imprisonment and to fines.

2. The appellants in Criminal Appeal No.1/2004 were accused Nos.2 and 3 and the appellants in Criminal Appeal No. 3/2004 were accused Nos.4 to 9 in the said Sessions Case. A.1 Pramod M. Naik died in the course of the trial.

3. The incident giving rise to the said Sessions Case took place on 21.2.1999 at Dhargal, Pernem, within the jurisdiction of Pernem Police Station between 16.30 to 17.30 hrs. The said incident took place, as was conveyed to the Police Station on telephone, between the tourists and locals. A group of about 59 persons working for the Maharashtra State Road Transport Corporation (M.S.R.T.C.) had come to Ratnagiri for a workers meeting, by their bus No. MH-20D-3134 driven by P.W.5 Asgar Ali. They decided to visit Goa, but when they reached at about 6.00a.m. On 21.2.99 near the Goa check post their bus was not allowed to enter Goa as it did not have a permit. Therefore they decided to hire a local bus and collected Rs.60/- each and deputed one R.G. Kalyankar and Maruti Gaekwad to go to Mapusa to arrange for a bus and which was arranged for Rs.2000/- and an advance of Rs.800/- was paid. Some of the persons of the said group chose not to go for the tour, but 47 others went in the said Bus No. 5008. As stated by P.W.3 Babu Baig they left the check-post at about 12.30 hrs. and returned at about 4.00 p.m. and since the driver of the said bus had refused to show to them all the places as agreed earlier, they told the driver that they should be given a discount which was not agreed to by the said driver, and as claimed by P.W.3 Babu, the driver locked the dicky of the bus containing their luggage and stated that he would not give it back to them until the payment of hire charges of Rs.2000/- was settled and the said driver went and sat in the liquor shop and thereafter P.W.3 Babu Baig, the said

Kalyankar , the said Gaekwad and some others went to the Bar and requested the driver to return the luggage, who again refused. As claimed by P.W.3 Babu, the said driver along with the bar owner and other three to four persons, told them that in case they did not agree to pay the hire charges they would take away the tyre of the bus. At this point of time, the fight started, and, as far as how it started there have been different versions given by different witnesses.

4. As stated by P.W.2 H.C. Parab, one Gurudas Mashelkar phoned the Pernem Police Station stating that locals were assaulting the tourists and a police party including P.W.2 Head Constable Porob and P.W.12 Ulas Kalshikar reached the scene. The injured were brought in the police jeep and sent for medical treatment and on return P.W.3 Babu Baig filed his complaint. P.W.3 Babu Baig stated in the complaint filed by him that he was shown a photo album of some criminals amongst whom he identified A.1 Pramod, A.4 Abay, A.6 Pradip and A.7 Subash. He therefore lodged his complaint against the aforesaid four persons and the driver of the said bus and four others whom he stated he would be in a position to identify for having assaulted them with stones, iron bar, swords, etc. It is this complaint which culminated in the Police filing a charge sheet and ultimately in the said Sessions Case.

5. On the other hand, the said A.1 Pramod M. Naik also filed a complaint alleging that he had noticed that there was a dispute between

the tourists from S.T. Bus and the bus operator of the bus “Amar” over the issue of payment and as the discussion was going on, some of the said tourists came and sat in his bar to drink and at this time some other tourists pelted soda bottles and beer bottles on the driver of the said bus Amar and some of the bottles which were pelted fell on the glass of his bar causing damage and when he went to question them, some of the tourists who were present there hit him with an iron rod and others pelted stones on his head causing injuries to him and meantime the said bus “Amar” went away and suddenly the tourist mob turned violent and started damaging his bar and liquor bottles in the said Bar. However, A-1 Pramod Naik on the next day in his supplementary statement, stated that having been shown the occupants of two S.T. Buses and having minutely observed them, he was not in a position to identify any of them, as a result of which the said complaint of A.1 Pramod was sent as 'A' Summary.

6. In the trial the prosecution examined 16 witnesses. The said R.G. Kalyankar and Maruti Gaekwad who had arranged the bus were not examined.

7. As far as the genesis of the incident is concerned, according to P.W.3 Babu Baig, one of the persons who came along with the driver caught hold of the collar of the said Kalyankar and one of them started assaulting them. He did not even say as to which of the accused had

first hit which of them. He has not spoken about any heated discussion, as otherwise stated by P.W.11 Hanumant Piragi, but according to P.W.4 Shivraj the driver and the conductor went to a nearby place and returned with ten to twelve persons and the said persons brought by the conductor and the cleaner started assaulting them.

He did not even identify who amongst the said driver, conductor and cleaner or other persons started the assault first and on which of them. But according to P.W.9 Pawan Tunganwar the incident started after the bus driver went to the bar and returned with some persons who flung soda bottles on the bus in which process some of them like Ardhapure, Sonarke, Rhode and Inamdar got injured. Therefore, in the light of the said conflicting versions as to how the incident started, the prosecution case that it is the accused who began the assault could not have been accepted.

8. Admittedly, none of the accused were known to the prosecution witnesses earlier and no test identification parade was held by the I.O. Shri Karekar (P.W.15). It appears that he remained satisfied with the identification done by some of the prosecution witnesses based on the photographs shown to them. As far as the identification of the accused was concerned, P.W.5 Asgar Ali had clearly and unequivocally stated that he was not in a position to identify any of the persons who were present at the time of assault. Likewise P.W.9 Pawan Tunganwar had also stated that he was not able to identify the bearded bus driver

who followed them on the motorcycle nor the other persons including the bus driver. P.W.10 Abdul Khalif had similarly stated that he was not in a position to identify the persons who had assaulted them and caused damage to the bus. P.W.11 Hanumant Piragi only stated that there was heated discussion between the bus driver and their representatives over the rate and the sight-seeing but he did not wait on the spot. Probably he got scared first only and went away.

9. P.W.3 Babu Baig, as already stated, in the complaint filed by him had implicated only A.1 Pramod, A.4 Abay, A.6 Pradip and A.7 Subash. But before the court he stated that all the accused were the persons who were involved in the assault. At the same time he stated that he was not in a position to identify the driver of the bus nor A.7 Subash who was on exemption on that day. It has been rightly pointed out on behalf of the accused that the driver of the said bus is a person whom the prosecution witnesses who went for the tour might have been seen for a longer time and not only that they interacted with him very closely when there was a discussion regarding the payment of the agreed fare, on the allegation that they were not taken to all the places, and being so it is the driver who should have been easily identified by them. I am in complete agreement with the said submission. If P.W.3 was not in a position to identify the said driver and had also stated that he could not identify A.7 Subash, his identification regarding the remaining accused could have been taken only with a pinch of salt. P.W.3 Babu

was also not in a position to identify the person who allegedly assaulted P.W.5 Azgar while he and the said P.W.5 Asgar were sitting in the police jeep. P.W.3 Babu Baig also did not corroborate the statements made by him in his complaint as regards the identification of the accused. It is also difficult to accept that a person could hit him from the back and injure him on his right eyebrow and therefore the injury on his right eyebrow does not at all appear to have been caused to him in the manner alleged by him. Regarding the identification by photographs, he stated that he was shown a photo album, but did not count the total number of photographs. He also could not recall if the said photographs were coloured or black and white. He further stated that he had identified about eight to nine accused based on the photographs. This statement is contrary to what he stated in his complaint. P.W.3 Babu also stated that he was not in a position to say if the driver of the bus was amongst the four persons whom he had identified as assailants and further stated that he had identified the driver of the bus amongst the four persons who were shown to him on the next morning. It is certainly not the case of P.W.15 P.S.I Karekar that he had brought some persons on the next day and got them identified by any of the prosecution witnesses.

10. P.W.4 Shivraj stated that he was assaulted with a sword by a person who had long hair but fairly stated that he was unable to identify him as none of the accused before the Court had long hair. Apart from identifying A.1 Pramod who was running a bar-cum-hotel P.W.4 Shivraj

did not identify any of the accused as assailants. He has not corroborated the version of P.W.3 Babu Baig.

11. P.W.6 Laximan Sonparkhe clearly stated that he had identified on the basis of photos A.1 Pramod who was on the spot besides two/three persons. In one breath he stated that he could not identify all the assailants as he was nervous due to the incident, but in another breath he stated that all the accused were present as the assailants including A.1 Pramod. As in the case of P.W.3 Babu Baig, P.W.6 Laximan Sonparkhe stated that he was not in a position to identify who amongst the accused was the driver of the local bus engaged for sight-seeing and he was also unable to say whether the said driver was present amongst the accused in Court. In further cross-examination he categorically stated that he would not have been in a position to identify the assailants even if the test identification parade was held shortly after the incident and further stated that he was not in a position to say whether the accused were amongst the assailants on that day.

12. P.W.2 Head Constable Parab and P.W.12 the police driver are the other two witnesses examined by the prosecution. P.W.2 Parab is the witness, who had stated in his statement to the Police that on seeing the police jeep the locals had stopped assaulting the tourists and when he was confronted with the said statement, he was unable to give any explanation and therefore his statement before the Court that A.1, A.4,

A.6 and A.7 (all previous convicts) along with the locals were assaulting the tourists with slaps, cannot at all be accepted, more so because it is also not the case of other prosecution witnesses that they were assaulted in that manner. It is interesting to note that P.W.2 Parab had earlier admitted in his statement that about 50 persons including the locals and tourists were assaulting each other and that only shows that there was a free fight between the tourists as well as the locals. It is also interesting to note that P.W.2 Parab went further and stated that what he had stated in his police statement was correct and not what he had stated before the Court. He stated that he had not arrested any person in connection with the case.

13. P.W.12 Police driver Ulhas claims having seen A.6 Bhuso giving a slap on the face of one of the tourists, but on seeing the police jeep the accused and the locals started going away. Even this statement of P.W.12 Ulhas is difficult to be accepted because, whether it is the tourists or locals seeing the police jeep coming from a distance might have certainly tried to run helter skelter and not wait there to be noticed by the police in assaulting each other. P.W.12 Ulhas has given his own version which is otherwise not deposed to by any of the other witness.

14. The remaining witnesses examined by the prosecution were P.W.1 the Medical Officer who had examined the said P.W.3 Baig, P.W.4 Shivraj, P.W.6 Laximan and P.W.14 Nagnath at the request of the Pernem Police. P.W.7 Mohamed was a panch witness to the scene of offence

panchanama. P.W.8 Venkat was a panch witness of the panchanama drawn of two buses having Maharashtra numbers. P.W.13 Janba is the A.S.I. who attached a stepney tyre which was lying in the bushes. P.W.15 Karekar was the I.O. who investigated the case and P.W.16 is another panch witness to the attachment of Maruti Car No.GGC-200. There is no evidence as to what connection the said Car had to the present incident.

15. Identification parades are conducted for two purposes: First to enable the witnesses to enable themselves that the accused whom they suspect is really the one who was seen by them in connection with the commission of the crime. The second is to satisfy the investigating authority that the suspect is the real person whom the witnesses had seen in connection with the said occurrence. In the case of **Sarwan Singh v. State of Punjab [(2003) 1 S.C.C. 240]** the Supreme Court has held that ordinarily identification of an accused for the first time in Court by a witness should not be relied upon for the purpose of passing the order of conviction without a definite corroboration since identification for the first time in Court cannot possibly be termed to be non-admissibly but it is a matter of prudence and jurisprudential requirement that the same should be upon proper corroboration otherwise the justice delivery system may stand affected.

16. In the case at hand there was not even unanimity amongst the prosecution witnesses, particularly those who were injured, as to how

the incident began or how it continued at least for some time. None of the prosecution witnesses particularly those injured were able to identify the accused with any degree of certainty. P.W.3 Babu's statement identifying all the accused for the first time in Court could not have been accepted. His statement that he had identified 8-9 accused from photos could not be accepted because only four accused are previous convicts and not others. P.W.4 Shivraj Ardhapure had identified only A.1 Pramod who was dead. There was no corroboration to the case of prosecution as to how the incident took place or as to the identity of the accused. Prudence therefore required that in such a case the accused deserved to be given the benefit of doubt. The accused, therefore, could not be convicted and sentenced by the learned Addl. Sessions Judge.

17. In the circumstances, therefore, the appeals are bound to succeed and the conviction and sentence recorded by the learned Additional Sessions Judge is bound to be disturbed and set aside. Consequently, all the accused shall stand acquitted for the offences they were tried, convicted and sentenced.

N. A. BRITTO, J.

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